Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO ~~77-1059~~

ELLA WEESE WATSON BOSSARD, ET AL

Plaintiff-Petitioner

VERSUS

EXXON CORPORATION

Defendants-Appellees

THE PETITION OF ELLA WEESE WATSON BOSSARD, ET AL FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals, rendered September 23, 1977, and appearing at 559 F.2d_____(5th Cir. 1977), is reprinted as Appendix A herein. The petition for rehearing which was denied on October 25, 1977, is reprinted as Appendix B. The judgment of the United States District Court, Middle District of Louisiana, granting defendants-appellees' motion to dismiss for failure to state a claim on the 29th day of December, 1975, is reprinted as Appendix F.

JURISDICTION

The opinion and judgment of the United States Fifth Circuit Court of Appeals for which this Writ of Certiorari is sought were rendered on September 23, 1977.

An order denying a rehearing was rendered by the Court on October 25, 1977.

The jurisdiction of this court over this petition for certiorari is set out by 28 U.S.C. 1254 (1), which permits review by the United States Supreme Court to any party by writ of certiorari.

QUESTIONS PRESENTED

1. Should the principles of maritime negligence espoused in Kermarec v. Compagnie Generale Transatlantique (1957) 358 U.S. 625, 79 Supreme Court 406 be applied in a 905 (b) action?
2. If maritime negligence is rejected and land-based principles of law are applicable in a tort claim under 905 (b), should all of the Restatement of Torts 2d. §§ 411, 413, 416, 423 and 427 be applied?
3. Should principles of strict liability be applied in cases involving 905 (b)?
4. Should the defendant, Exxon, have been granted their motion to dismiss for failure to state a claim?

STATUTORY PROVISIONS INVOLVED

1. 33 U.S.C. §§ 905

(a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel.

> The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

Restatement of Torts 2d § 411, 413, 416, 423 and 427 are presented as Appendix G.

STATEMENT OF THE CASE

On January 5, 1975, Donald Bossard, who was employed by Port Allen Marine, at its plant on the east side of the Mississippi, three (3) miles below Louisiana State University at Baton Rouge, died as a result of asphyxiation on the Exxon Barge 217, which was owned by the defendant, Exxon. The barge was carrying a load of Exxon Extra in compartments one (1) through five (5); 115 aviation gasoline in six, seven and eight and 100 aviation gasoline in compartment nine, (the one where Donald Bossard met his death). The Exxon 217 had been sent to Port Allen Marine to be gas-freed and cleaned preparatory to it being dry docked for Coast Guard inspection and repairs.

The defendant, Exxon and Port Allen Marine had entered into a contract, allegedly written on October 15, 1974, in which Port Allen Marine was, from time to time required to

clean and gas-free Exxon's barges. A telephone call was all that was needed in order for Exxon to send one of its barges to Port Allen Marine for it to be cleaned. Exxon did not supervise Port Allen Marine or instruct them in any way concerning the manner in which Port Allen Marine cleaned the barges, however Exxon employees sometimes did visit the Port Allen Marine plant during the gas-freeing operation and had experience in gas-freeing some of its own barges.

Also in the instant case, Exxon had an employee wearing two hats. Joseph Labauve was employed by Exxon as a chemist and also by Delta Laboratories, a corporation that gas-freed barges at the Port Allen dock. Tom Wolfe, the owner of Port Allen Marine, also was part owner of Delta Laboratories. Labauve had been at the Port Allen Marine dock at numerous occasions during gas-freeing operations and it goes without saying that Exxon had corporate knowledge of the activities at Port Allen Marine.

On the day in question, a Sunday, Bossard had reported to work about 8:30 or 9:00 o'clock A.M. The

crew was working short-handed that morning and though there was a rule that men were suppose to stay on top of a hole when a man was down in a compartment. This was not the case that morning. In fact, another employee was overcome by gas in compartment number five around 10:00 A.M. and he was rushed to the hospital. No one advised Bossard nor was he checked upon until his body was found at approximately 12:00 o'clock noon on that day. Between 10:00 and 12:00 o'clock, the supervisor at Port Allen Marine went and had coffee with some of the employees at a location remotely located from Exxon 217 even though he knew that his crew was shorter since two men had taken the employee who was overcome to the hospital. The testimony in the depositions show that this type of activity occurred all the time at Port Allen Marine and there is no doubt that Exxon, through Joseph Labauve, had constructive knowledge of the events occurring at Port Allen Marine.

A R G U M E N T

1. PRINCIPLES OF MARITIME NEGLIGENCE SHOULD BE APPLIED IN SECTION 905 (b)

Plaintiff submits that the term negligence as used in § 905 (b), is not limited to ordinary negligence and its usage should include vicarious and strict liability. Plaintiff also urges that the court should follow the principles of maritime negligence as stated in Kermarec v. Compagnie Generale Transatlantique (1959) 358 U.S. 625, 79 Supreme Court 406, where the court stated that the duty owed was "the exercise of reasonable care under the circumstances in each case". This of course, is the strongest principle in ordinary negligence and would include vicarious and strict liability.

Though the legislative history of § 905 (b) is intended to limit actions against the ship owner and eliminate strict liability, one of the principle considerations of the legislative history was employee safety. Up to this time, employee safety has been given little consideration and the application of the term "negligence" as stated in the legislative history.

makes the shipowner look the other way. The principle in Kermarec is by far the better rule to be applied in this case and other cases under § 905.

Though the Fifth Circuit in Gay v. Ocean Transport and Trading, Ltd., 546 F.2d 233 (5th Cir.1977) allows only the application of land-based principles of negligence, it is in conflict with another decision. In Brown v. Ivarans Rederi, A/S, 545 F.2d 854 (3rd Cir., 1977), the court held that "principles" of the law of negligence as adopted in the admiralty field during the history of our court" may be applicable in a 905 (b) action. It is therefore necessary for this court to resolve the difference between circuits to determine which principle of negligence applies.

Likewise, plaintiff submits that there is a duty to provide a safe place to work and that this duty should be extended to protect an employee of an independent contractor, Halecki v. United New York, N.J. Sandy

Hook Pilots Association, 302 F.2d 840 (2nd Cir.), certiorari denied, 371 U.S. 825, S.Ct. 46, 9 L. Ed. 2nd. 64 (1962).

The court in Hess v. Mississippi Towing Corporation, 559 F.2d 1030 (5th Cir. 1977), (companion suit to instant case), decided that neither Bossard or Hess was owed a duty by the ship owner to provide a safe place to work because Halecki, supra, did not apply. Plaintiff states that the ship owner and Halecki appeared to have no more control than the defendant in the Exxon case. Also, here Exxon had an employee wearing two hats and had constructive knowledge of the manner in which the work was performed at Port Allen Marine. Plaintiff urges the court to apply Halecki, supra, in this case.

2. IN THE ALTERNATIVE, IT IS NECESSARY TO APPLY TO RESTATEMENT OF TORTS, SECOND § 411, 413, 416, 423, AND 427 TO ACCOMPLISH A UNIFORM LAND-BASED PRINCIPLE FOR IMPOSING LIABILITY

If maritime principle of negligence are to be rejected,

and the court must apply a uniform federal standard, it is submitted that Restatement of Torts, §§ 411, 413, 416, 423 and 427 should be applied under §§ 905 (b) against the shipowner.

The plaintiff submits that the Restatement of Torts, §§ 411 and 413 do not require the court to impose vicarious liability on the defendant which the Court in Hess, supra, states is precluded by §§ 905 (b). Restatement of Torts, §§ 411 requests that the owner select a competent and careful contractor while §§ 413 requests that the owner must take precautions against the dangers involved in work entrusted to a contractor.

Restatement of Torts, Articles 416 §§ 423 and 427 would impose vicarious liability on the defendant; however, the Court refuses to apply them since it is stated by the Court in Hess, supra, that they are prevented from doing so by §§ 905 (b). These three sections, along with §§ 413, however, apply to "others" and as stated above, it can be reasonably argued that

employees of independent contractors should be included in this designation.

The Court in Eutsler v. United States, 376 F2d 634 (10th Cir, 1967) rejected the plaintiff's demands in a similar case, however, cited several cases where courts found that the term "other" should include employees of an independent contractor. Woolen v. Aerojet General Corporation, 57 Cal. 2d 407, 20 Cal. Rptr. 12, 369 P. 2d 708; Giarrantano-v. Weitz Company, 259 Iowa 1292, 147 N.W. 2d 824; Hagberg v. City of Sious Falls, 281 F. Supp. 460 (D.C.S.D.)

All of these Restatement Sections should be extended by this Court to cover employees of independent contractors. This should especially include Restatement §§ 413, since this article does not impose vicarious liability on the ship owner and it also applies to "others".

The Court in Lindler v. District of Columbia, 164

U.S. App. D.C. 35, 502 F.2d 495 (1975), allowed an employee of an independent contractor to recover from the contractor's employer using a theory similar to Restatement of Torts, § 413. The Court in Hess, supra, rejected the view in Lindler as the minority view; however, plaintiff submits that it should be the view adopted to achieve a uniform federal interpretation of Section 905 (b). Likewise, the Court should adopt the Restatement sections to extend protection to employees of independent contractors.

3. STRICT LIABILITY SHOULD BE APPLIED WHERE THE WORK IS ULTRAHAZARDOUS OR INHERENTLY DANGERS

Plaintiff also urges that the Court should adopt the principle of strict liability in the instant case. The Court in Hess, supra, stated that the Congressional Committee reports accompanying the 1972 Amendments to the Longshoreman's and Harborworkers Compensation Act 33 USCA 905 (b), emphasize an intent to eliminate a strict liability concept and to limit the liability of the ship owner for injuries received

by longshoremen. Plaintiff submits that another purpo[se] of the Act was to stress employee safety. As stated previously, this consideration has been given little effect. With all the responsibility removed from the ship owner. dangerous conditions will be created and allowed to exist by the ship owner if they have no resulting liability for the death or injury of a longshoreman.

In applying a strict liability standard, the Court shoul[d] give effect to Restatement of Torts, § 416, which provid[es] that one who employs an independent contractor to do wor[k] that is dangerous, will be negligent in the absence of taking special precautions to make sure that the work is done safely. Likewise, Restatement of Torts, § 427 deals with the employment of an independent contractor when dealing with work of a dangerous nature.

In Fitzgerald v. Compania Naviera La Molinaro, 394 F.2d 402 (E.D.LA., 1975), Judge Rubin refused recover to a longshoreman who was overcome in the hole of a ship but

stated that "...it would be manifestly unfair to hold the vessel interest liable for the untoward results occuring in the course of work which they have turned over completely to an independent contractor, provided the delegated work is not inherently dangerous." (Emphasis added.).

Plaintiff urges that the Restatement § 416 and 427 be read with the Fitzgerald case, supra, to establish a theory of strict liability in this area of the law.

4. DEFENDANT SHOULD NOT HAVE HAD TWO OPPORTUNITIES TO PRESENT A MOTION FOR SUMMARY JUDGMENT ON THE SAME GROUND.

The plaintiff would point out that the trial court entertained two separate and distinct motions, both of which dealt with the same issues. The first was a Motion For Summary Judgment filed by Exxon on March 25, 1975. On April 17, 1975, the trial court denied to motion. The Motion For Failure to State a Claim was filed at the trial court's direction immediately after the pretrial conference. If this

as translated into a Motion For Summary Judgment, the defendant, Exxon, had two bites at the applies without plaintiff presenting it's case. On the facts, plaintiff suggests that the second Motion For Summary Judgment be reversed.

CONCLUSION

It is respectfully suggest that a Writ of Certiorari issue directed to the Fifth Circuit Court of Appeals in order that this Court may put to rest the conflict among the circui as to the applicable law to be applied in a 905 (b) action.

BY ATTORNEY:

John F. McKay
CAVE, McKAY & POIRIER
7465 Exchange Place
Baton Rouge, LA 70806

C E R T I F I C A T E

I hereby certify that three copies of the foregoing has been mailed this date, postage prepaid, to all counsel of record: John F. Reid, P. O. Box 60626, New Orleans, Louisiana 70160; and David W. Robinson, P. O. Box 2995, Baton Rouge, Louisiana 70821, on this_____day of _____,1978.

_____
John F. McKay

COURT OPINION

Before GEWIN, RONEY and HILL, Circuit Judges

RONEY, Circuit Judge:

The plaintiffs' decedent worked for an independent contractor, Port Allen Marine, employed by defendants to clean a barge of petroleum fumes and residue. In 1975 he was asphyxiated while working inside a barge tank. Plaintiffs sued defendants for negligence under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 905(b) (Supp.1977). The trial court dismissed the complaint on motion. basing its ruling on the similarity between this case and Hess v. Upper Mississippi Towing Corp., Civ. No. 74-115 (M.D.La. October 21, 1975), in which defendants prevailed on a directed verdict. The appeals were argued together. We affirm the dismissal of this case largely on the basis of our reasoning in affirming Hess, slip Opin. 6161,--F.2d--(5th Cir. 1977) (No.75-4353). See also Parson v. Amerada Hess Corp., 422 F.2d 610 (10th Cir. 1970); Cf. Uglem v. Foss Launch & Tug Co., 541 F.2d 1378 (9th Cir. 1976) (no seaworthiness recovery).

[1,2] This appeal raises certain questions not presented in Hess. First, the plaintiffs argue dismissal under Fed.R.Civ.P. 12(b)(6) was improper, because they stated a claim upon which relief could be granted. The argument misstates the nature of the district court's decision. Both the language of the rule and the law of this Circuit indicate that when a trial court takes into consideration depositions and other information outside the pleadings, as was done here, the grant of motion to dismiss is to be treated as summary judgment under Fed. R.Civ.P. 56. Herron v. Herron, 255 F.2d 589 (5th Cir.1958). See Wright & Miller, Federal Practice and Procedure §§ 1366 & n.67 (1971). Plaintiffs have not demonstrated any prejudice or lack of notice sufficient to establish an exception. Consequently the case does not turn on the failure to state a claim, but on whether the plaintiffs have produced a material issue of fact which, if proved, would entitle them to relief as a matter of law. Fed.R. Civ.P. 56.

[3] Part IV of the Hess opinion deals with the shipowner's liability for open and obvious dangers on

board the vessel. The gas in the tank which asphyxiated the plaintiffs' decedent was such a danger. It was one of the conditions that Port Allen Marine was hired to correct. While, under Restatement (Second) to Torts §§ 343,343A (1965), as interpreted in Gay v. Ocean Transport & Trading Ltd., 546 F2d 1233 (5th Cir. 1977), the shipowner is potentially liable for injuries caused by such dangers if the danger cannot be appreciated by invitees or cannot be avoided, neither circumstance applies to this case. Port Allen Marine and Bossard knew of the danger. See Gulf Oil Corp. v. Bivins, 276 F.2d 753, 756-758 (5th Cir.), cert. denied, 364 U.S. 835, 81 S.Ct. 70,5 L.Ed.2d 61 (1960).

[4,5] The plaintiffs assert a ground for liability not mentioned in Hess. They allege the defendants breached two sets of federal regulations, so that a material issue of fact with respect to their negligence exists. Neither set of regulations, however, applies to the facts of this case. The Coast Guard regulations, 46 C.F.R. 35.01-1 (1976), pertain to precautions taken when riveting or

welding a barge tank and do not apply to cleaning. The safety and health regulations for longshoremen, 29 C.F.R. 1915.11-12 (1976), impose duties on Port Allen Marine, but not on the shipowner. Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977); see generally 90 Harv. L. Rev. 1041 (1977).

AFFIRMED.

D E N I A L

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, ** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule (12) the petition ( ) for reharing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

EDWARD W. WADSWORTH
Clerk

**On behalf of appellant, Ella Weese Watson Bossard,

CAPTION DELETED APPENDIX C

MINUTE ENTRY:
DECEMBER 3, 1975
WEST, J.

Pre-trial conference was held this day and pre-trial order was entered herein. After due consideration of the record in this case, the pre-trial order filed herein, including the stipulation of uncontested facts, the depositions taken, and the arguments of counsel, it is the opinion of this Court that this case is, for all practical purposes identical with the case of Hess v Upper Mississippi Towing Corp., bearing Civil Action No. 74-115 on the docket of this Court. That case was decided adversely to the plaintiff on October 21, 1975. As in Hess, it is the opinion of this Court that the plaintiff here has failed to state a claim upon which relief can be granted. Counsel for the defendant is hereby directed to file a motion to dismiss, and upon receipt of that motion, this case will be dismissed.

UNITED STATES DISTRICT JUDGE

John F. McKay,Esq.
Robin W. Poirier, Esq.

E. Burt Harris, Esq.

David W. Robinson, Esq.

CAPTION DELETED APPENDIX D

MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM

NOW INTO COURT, through undersigned counsel, comes Exxon Corporation and moves for the dismissal of plaintiffs' case herein for failing to state a claim upon which relief can be granted.

Based on the facts established by pleadings or by stipulation or admission of counsel, as set out in the Pre-trial Order filed herein on December 3, 1975, as well as the material facts claimed by plaintiff and contested issues of law likewise set out in the aforesaid pre-trial order, plaintiff has failed to state facts necessary to show a breach on the part of defendant, Exxon Corporation, of any duty owed to the decedent, Donald Bossard, and has, therefore, failed to state a claim upon which relief can be granted.

WHEREFORE, defendant, Exxon Corporation prays that Judgment be rendered in its favor and against plaintiffs, dismissing their suit with prejudice and at plaintiffs' costs.

John F. McKay

BY_____

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CAPTION DELETED APPENDIX E

MINUTE ENTRY:
DECEMBER 23, 1975
WEST, J.

This matter comes before the Court on the motion of the defendant, Exxon Corporation, to dismiss this case for failure to state a claim upon which relief can be granted. There are no material issues of fact involved in this case, and based upon the facts as reflected by the record, it is the opinion of this Court that plaintiff has indeed failed to state a claim against Exxon Corporation upon which relief can be granted. This case is identical with the case of Phillip Hees v. Upper Mississippi Towing Corporation and Penlatex Barge Lines, Inc., Civil Action No. 74-115 on the docket of this Court, which was dismissed by this Court on October 21, 1975. Therefore:

IT IS ORDERED that the motion of the defendant, Exxon Corporation, to dismiss this case as to them be, and it is hereby GRANTED, and this suit is hereby DISMISSED in its entirety.

_____
UNITED STATES DISTRICT JUDGE

APPENDIX F

ELLA WEESE WATSON BOSSARD,
Indiv., et-c. ET AL

vs CIVIL ACTION

EXXON CORPORATION, ET AL NO. 75-27

You are hereby notified, pursuant to Rule 77 (d) of the Federal Rules of Civil Procedure, of the entry as of this date of the Court's order dismissing the captioned suit.

CHARLES H. BANTA, CLERK

By_____
Chief Deputy

TO:

E. Burt Harris, Esq.

Donald G. Cave, Esq.

David W. Robinson, Esq.

APPENDIX G

RESTATEMENT OF TORTS 2d - 1965

411. Negligence in Selection of Contractor

An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor

a. to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or

b. to perform any duty which the employer owes to third persons.

413. Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor

One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer

a. fails to provide in the contract that the contractor shall take such precautions, or

b. fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

416. Work Dangerous in Absence of Special Precautions

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

423. Making or Repair of Instrumentalities Used in Highly Dangerous Activities

One who carries on an activity which threatens a grave risk of serious bodily harm or death unless the instrumentalities used are carefully constructed and maintained, and who employs an independent contractor to construct or maintain such instrumentalities, is subject to the same liability for physical harm caused by the negligence of the contractor in constructing or maintaining such instrumentalities as though the employer had himself done the work of construction or maintenance.

427. Negligence as to Danger Inherent in the Work

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precuations against such danger.

Supreme Court, U. S.
FILED
FEB 24 1978
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1059

ELLA WEESE WATSON BOSSARD,
INDIVIDUALLY AND AS ADMINISTRATRIX
OF THE ESTATE OF DONALD BOSSARD,
AND GENIEVEVE BOSSARD AND
BERTHA LEE BOSSARD,
Petitioner

v.

EXXON CORPORATION, LAMAR LABAUVE,
TOM WOLFE, JOSEPH LABAUVE, AND
DELTA LABORATORIES,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1059

ELLA WEESE WATSON BOSSARD, et al.,
Petitioner

v.

EXXON CORPORATION, et al.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT EXXON CORPORATION IN OPPOSITION

OPINIONS BELOW

The judgment of the District Court granting respondent's motion to dismiss for failure to state a claim, reprinted as Appendix F of Petition, is unreported. The opinion of the Court of Appeals for

the Fifth Circuit (App. A of Petition) is reported at 559 F.2d 1040.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Should the principles of maritime negligence espoused in Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1957), be applied in an action under 33 U.S.C. § 905(b)?
2. If maritime negligence is rejected in favor of land-based principles of law in a claim under 33 U.S.C. § 905 (b), should the Restatement (Second) of Torts, §§ 411, 413, 416, 423 and 427 be applied?
3. Should principles of strict liability be applied in cases involving 33 U.S.C. § 905(b)?

4. Should the respondent, Exxon, have been granted its motion to dismiss for failure to state a claim?

STATUTES INVOLVED

The pertinent provisions of the Longshoremen's and Harborworkers' Compensation Act, as amended on October 27, 1972 (86 Stat. 1263, 33 U.S.C. § 905(a) and (b)), are set forth in the Petition at pp. 3 and 4.

STATEMENT OF THE CASE

The EXXON BARGE 217 is an unmanned barge owned by respondent. It had discharged its previous cargo of gasoline and, on or about January 4, 1975, was delivered to the Baton Rouge facilities of Port Allen Marine Service to be cleaned and certified gas free preparatory to drydocking for repairs.

On the morning of January 5, 1975, decedent Donald Bossard was one of three

employees of Port Allen Marine Service assigned to perform the cleaning operations on the barge, which included ventilating the cargo compartments and washing down the sides and bottom with hot water. Bossard was a barge cleaner of some thirteen years experience.

In accordance with Port Allen Marine's safety rules and procedures, forced air breathing masks were issued for use by Bossard and his co-workers while inside the cargo compartments. After preliminary operations on deck, the three men commenced the cleaning process inside separate compartments.

Although one of his co-workers claims to have been overcome by gasoline fumes in the course of the morning and was taken to the hospital, neither Bossard's supervisor nor any of his co-workers advised him of this fact or checked on him until near

noon. At that time, Bossard was discovered lying face down in the cargo compartment in which he had been working. He was taken to a local hospital where he was pronounced dead by asphyxiation.

Bossard was not wearing an air mask when found. The mask believed to have been his was found in operating condition on deck outside the compartment entrance.

As a result of the foregoing, petitioners brought the instant action in the federal court in the district of petitioners' domicile. Jurisdiction was based on the allegation that the claim arose "...out of and from the unseaworthiness of a vessel and a maritime tort occurring upon the navigable territorial waters of the Mississippi River at the Port of Baton Rouge." (Para. 5, Original Complaint, App. F)

ARGUMENT

THE APPLICATION OF MARITIME PRINCIPLES OF NEGLIGENCE IS CONTRARY TO CONGRESSIONAL INTENT

In its decisions in the instant case and in the companion case of Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030 (5th Cir. 1977)[1/], the court below specifically held that "general maritime law, as such, does not control [the] outcome of these third party actions [under § 905 (b)]" and refused to apply the principles of vicarious or strict liability to the vessel owner. (App. A, p. 8) Although petitioners concede that the object of Congress in enacting § 905(b) was "to limit actions against the shipowner and eliminate strict liability" (Petition, p. 7), nonetheless they urge this Court to apply vicarious and strict liability

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1/Petition for a writ of certiorari was filed with this Court on January 18, 1978, under Docket No. 77-1025. The opinion below is reprinted herein as Appendix A.

concepts purportedly enunciated by this court in Kermarec v. Compagnie Generale Transatlantique, 358 U.S.625, 630 (1958)[2/], suggesting that these are principles of maritime negligence.[3/]

The Circuit courts have been uniform in applying the congressional intent to look to land-based principles of negligence to the exclusion of maritime concepts of negligence. See Hurst v. Triad

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2/It should be noted that Kermarec is fully distinguishable from the facts at bar in that the plaintiff there was not an employee of an independent contractor and the vessel was, at all material times, fully within the owner's control.

3/No authority is cited to support the contention that principles of vicarious or strict liability are in any way incorporated within the Kermarec duty of the exercise of reasonable care under the circumstances of each case. It is well established that "negligence" does not encompass "strict liability." Dalehite v. United States, 346 U.S. 15 (1953).

Shipping Co., 554 F.2d 1237 (3rd Cir. 1977); Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233, 1237 (5th Cir. 1977), and the cases cited therein at note 7.

The Third Circuit is not in conflict with this principle in Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3rd Cir. 1976), cert. denied, ___U.S.___, 97 S.Ct. 1652 (1977). The correct quotation, at p. 863, is as follows:

> It would appear that the principles of the law of negligence, as adopted in the admiralty field during the history of our country, are to form the basis of any recovery against shipowners insofar as such principles are not inconsistent with § 905(b). (Emphasis added, footnote omitted)

It is apparent from this language that Brown does not hold, as suggested by petitioner (Petition, p. 8), that principles of maritime negligence may be applicable to shipowners in a § 905(b) action.

Petitioner further suggests that the

safety of longshoremen, ship repairers and other shore-based employees was ignored by Congress. On the contrary, the Act provides that the major responsibility for proper and safe conduct of the work is to be borne by the employer. 33 U.S.C. § 941(a). The entire scheme of compensation under this Act insures that the employer will pay a substantial penalty in terms of increased workmen's compensation insurance rates if it shirks this responsibility. Some portion of this economic penalty, of course, is passed on to the vessel owner in the contract price for the work to be performed. See Eutsler v. United States, 376 F.2d 634, 636 (10th Cir. 1967), citing Tentative Draft No. 7, Restatement (Second) of Torts, Special note to Chapter 15, pp. 17-18.4/

4/Although not cited in the final publication of Restatement (Second), this note has been cited with approval in Richardson v. United States, 251 F.Supp. 107 (W.D. Tenn. 1966), and Welker v. Kennecott Copper Co., 403 P.2d 330 (C.A. Ariz. 1965).

Thus, as one commentator has recently noted:

> The Act, as amended, takes care to impose primary responsibility for the safe conduct of the work upon the stevedore-employer, preserve the shipowner's responsibility for actions of the vessel only, and refrain from any interference in the economic symbiosis existing between the shipowner and stevedore. George, The Content of the Negligence Action by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, II, 2 The Maritime Lawyer 15, 31 (1977).

Petitioners argue that there remains a non-delegable duty on the vessel owner to provide the contractor's employee with a safe place to work. It is now generally recognized, however, that,

> [The stevedoring company] is in the position best to provide for the safe unloading of the cargo. [It] is hired for its expertise in handling cargo safely and its personnel make all of the decisions as to how best to conduct the unloading. Ramirez v. Toko Kaiun K.K., 385 F.Supp. 644, 653 (N.D.Cal. 1974).

Thus, once control of the vessel has been turned over to the ship repairer, the vessel owner's duty to provide a safe place to work is reduced to those matters remaining in his control.

Petitioners suggest, without citation of authority, that respondent somehow retained some aspect of control of the vessel on the basis of constructive knowledge of allegedly improper work methods of Port Allen Marine Service, obtained through Joseph LaBauve.[5/] There is no factual or legal basis for this contention.

5/Defendants Lamar and Joseph LaBauve, Tom Wolfe and Delta Laboratories were dismissed without opposition by petitioners upon showing that they had no connection whatsoever with the EXXON BARGE 217 or with the events of which petitioners complained. (Minute Entry of Trial Court, April 3, 1975, App. B). Mr. LaBauve was employed by respondent on a full-time basis as a laboratory supervisor as well as engaging in part-time activities on behalf of Delta Laboratories as a certified gas chemist.

On deposition, Mr. LaBauve testified that, in the course of his activities as a gas chemist for Delta Laboratories, he had never been called upon to inspect or test any barge prior to its being cleaned and that he was not familiar with the procedures used in cleaning and gas-freeing barges at any of the various facilities where he performed these duties. (Deposition of Joseph LaBauve, pp. 8-9, App. C)

Mr. LaBauve was not, as petitioners argue, "wearing two hats" for respondent. Rather, he had two separate employers and was "moonlighting" for Delta Laboratories. Any knowledge he may have acquired while performing activities on behalf of Delta Laboratories was outside the scope of his employment with respondent and cannot be charged or imputed to it. England v. American Southern Insurance Company, 380 F.2d 137 (4th Cir. 1967)

RESTATEMENT (SECOND) OF TORTS §§ 411 AND 413 HAVE NO APPLICATION TO THE INSTANT CASE

As a matter of land-based law, the clear weight of authority holds that the cited Restatement sections have no application to employees of independent contractors. In Hess, supra (App. A, pp. 18-21), the Court below exhaustively discusses the unanimity of the Circuits in holding that the employee of an independent contractor cannot recover from the employer of the contractor on the basis of Restatement (Second) §§ 411 and 413.

Respondent particularly invites the Court's attention to Parsons v. Amerada Hess Corp., 422 F.2d 610 (10th Cir. 1970), by virtue of its factual similarity to Bossard and Hess. There, the employee of an independent contractor hired by Amerada to perform cleaning operations entered a tank used for storage of crude oil containing deadly hydrogen sulfide gas. He

used a gas mask but was asphyxiated by the fumes. The Parsons court held, in construing the phrase, "to others" as used in §§ 413, 416 and 427, that,

> An employee of an independent contractor is not within the class of third persons to whom the employer of the independent contractor owes the non-delegable duty of due care [under Restatement (Second) §§ 413, 416 and 427] when such employee is engaged in the performance of inherently dangerous work. Id. at p. 616.

Parsons notes, but dismisses as the minority view, those few cases construing "to others" to include employees of an independent contractor.6/ Petitioner's reliance upon Lindler is misplaced, as the injury in Lindler occurred in 1970, prior to the amendments to the Longshoremen's Act. At that time the contractee had a

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6/With the exception of Lindler v. District of Columbia, 164 U.S.App.D.C. 35, 502 F.2d 495 (1974), these are state court cases applying state law.

clear right of indemnity under Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956), against the negligent contractor, a right specifically eliminated by the 1972 amendments of § 905(b).

Distinguishing the Parsons facts from a situation in which the employee of an independent contractor is injured by latent or hidden dangers, Chief Judge Murrah noted that,

> Everyone, including the decedent, knew of the danger inherent in the performance of the work and realized the necessity of taking special precautions to make the work safe. Id. at p. 616.

In the instant case, there is no dispute that the condition which caused the death of Mr. Bossard was known to all concerned and was precisely that which Port Allen Marine Service had been hired to eliminate. As a matter of general common law, it has long been held that, where the

employee is injured as the proximate result of conditions or defects which his employer, the independent contractor, is engaged to correct, liability cannot be predicated on the mere fact alone that these conditions were unsafe. Whitlow v. Seaboard Air Line R.R. Co., 222 F.2d 57, 59 (4th Cir. 1955).

IT WAS THE CLEAR INTENT OF CONGRESS TO ELIMINATE STRICT AND VICARIOUS LIABILITY ON THE PART OF VESSEL OWNERS IN A § 905(b) ACTION

Petitioners admit that Restatement (Second) §§ 416, 423 and 427 impose strict and/or vicarious liability. Having so concluded, petitioners cannot then seek to reinstate, through these sections of the Restatement (Second), the non-delegable and absolute duties which Congress set out to eliminate.

In Teofilovich v. d'Amico Mediterranean/Pacific Line, 415 F.Supp. 732 (C.D.Cal. 1976), the court refused to

apply Restatement (Second) §§ 413 and 416 to hold a shipowner vicariously liable for the negligence of the stevedore, holding that,

> This would do violence to the letter and policy of 33 U.S.C. § 905(b)....Congress specifically excluded a rule of vicarious liability, specifically excluded a rule of liability without fault and specifically excluded the concept of a non-delegable duty, all of which are the express and explicit result of Section 416. 415 F.Supp. at 734036.

See also, Frasca v. Prudential-Grace Lines, Inc., 394 F.Supp. 1092 (D.C.Md. 1975); Anuszewski v. Dynamic Mariners Corp. Panama, 391 F.Supp. 1143, 1145 (D.C.Md. 1975), aff'd, 540 F.2d 757 (4th Cir. 1976) (per curiam), Gay v. Ocean Transport & Trading, Ltd., supra, at 1239.

In making reference to the legislative history of the 1972 amendments to the Longshoremen's Act, the Third Circuit in Brown v. Irarans Rederi, A/S, supra,

referred to Senate Report No. 92-1125, 92nd Congress, Second Session 2 (1972), in stating:

> These authorities highlight the principal shortcoming of § 416 as a basis of imposing liability on the shipowner: It contravenes the express statutory purpose of § 905(b) by imposing vicarious liability on the shipowner for the negligent conduct of the stevedore or the stevedore's employees. 545 F.2d at 861.

Finally, despite the foregoing, petitioner urges the Court to adopt a principle of strict liability by virtue of the alleged ultra-hazardous nature of the work being performed by decedent. It is apparent that the work being performed by decedents in Parsons v. Amerada Hess Corp., supra, (exposure to hydrogen sulfide fumes while cleaning a crude oil storage tank) and in Eutsler v. United States, supra, and United States v. Page, 350 F.2d 28 (10th Cir. 1965), (preparation of solid rocket propellant) is no less

inherently dangerous than that being performed by Mr. Bossard. Far more control over the premises and the work being performed was exercised by the owner of the premises in Eutsler and Page than in Parsons or in the instant case. Nonetheless, the Tenth Circuit rejected the argument that the activity in which the decedent was involved was so dangerous as to impose liability on the one who hired the decedent's employer.

THE DISTRICT COURT PROPERLY CONSIDERED RESPONDENT'S MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT

The court below recognized in its Per Curiam opinion that, in granting respondent's motion to dismiss, the trial court properly treated it as a motion for summary judgment. Petitioners now argue that, if this be true, the trial court then entertained improperly two such motions dealing with the same issues.

A close examination of respondent's original motion for summary judgment (App. D) reflects that the sole issue presented there was whether a warranty of seaworthiness was owed by respondent-vessel owner to the decedent. The trial court held that no such warranty was owed and granted the motion as pleaded. Respondent's subsequent motion to dismiss addressed only the alleged negligence action under 33 U.S.C. § 905(b), preserved to petitioners by the trial court in its ruling on the first motion. (App. E) Thus, it cannot be maintained that respondent's basis for dismissal of the § 905(b) negligence action received consideration by the trial court more than once.

Assuming, arguendo, that respondent was afforded two opportunites to present its motion for summary judgment on the

negligence action, petitioner cites to this Court no authority prohibiting successive motions for summary judgment as to all or part of a given cause of action. In fact, the authorities are to the contrary. See Namirowski v. Nabisco, Inc., 421 F.Supp. 349, (N.D.Ill. 1976); Brownfield v. Landon, 113 U.S. App.D.C. 248, 307 F.2d 389, 393, cert. denied, 371 U.S. 924 (1962); Allstate Finance Corp. v. Zimmerman, 296 F.2d 797, 799 (5th Cir. 1961); 6 J. MOORE, FEDERAL PRACTICE ¶56.14[2] (1974).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below was clearly correct; there is no significant conflict within the Circuits as to the non-applicability of the principles which petitioners espouse. In short, the petition fails to disclose any matter or ground justifying review by this Honorable Court.

Respectfully submitted,

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C E R T I F I C A T E

I hereby certify that on this 24th day of February, 1978, three copies of the Brief for Respondent in Opposition were mailed, postage prepaid, to John F. McKay, 7465 Exchange Place, Baton Rouge, Louisiana 70806, Counsel for the Petitioner, and David W. Robinson, P. O. Box 2995, Baton Rouge, Louisiana 70821, Counsel for Intervenor below, pursuant to Rule 33(3)(b).

Original Signed by
E. BURT HARRIS
E. BURT HARRIS

APPENDIX A

PHILLIP HESS, Plaintiff-Appellant,

v.

UPPER MISSISSIPPI TOWING CORP.
and Penlatex Barge Lines, Inc.,
Defendants-Appellees,

Fidelity & Casualty Co. of New York,

Intervenor.

No. 75-4353

United States Court of Appeals,
Fifth Circuit

September 23, 1977.

Before GEWIN, RONEY and HILL,
Circuit Judges

RONEY, Circuit Judge:

The plaintiff worked for an independent contractor employed by defendants to "free" a barge of gasoline. An explosion burned him severely, and he sued the defendants, alleging failure to provide a safe place to work, negligent employment of an independent contractor, strict liability, and negligent maintenance of dangerous premises. At the

close of plaintiff's evidence, the district court directed a verdict against him. On appeal, he alleges the district court misapplied the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 905(b) (Supp. 1977),to foreclose his case. Because the Longshoremen's Act's compensation provisions afford the exclusive remedy for his injuries, we affirm.

The accident took place in 1973. Plaintiff's employer, Port Allen Marine, operated a facility on the Mississippi River for cleaning barges used to transport petroleum products. Pentalex Barge Lines, Inc. delivered to Port Allen Marine a barge owned by Upper Mississippi Towing Corp. The barge had recently carried a cargo of high-grade gasoline, but was empty except for residual gasoline and vapors which Port Allen was hired to

remove. While the plaintiff was using water to flush gasoline out of the barge's piping system, an explosion occurred which burned him severely. Plaintiff collected compensation benefits from Port Allen Marine under the Longshoremen's Act, and brought this tort action against the owner and the operator of the barge.

In directing a verdict, the district court found that, at the time of the accident, the barge was in the sole control of Port Allen Marine, a specialist in gas-freeing barges. The court held the defendants did not supervise the gas-freeing process, and were not apprised of any facts which would lead them to believe Port Allen Marine was not fully qualified for the job. On appeal, the plaintiff alleges the court erred in limiting his cause of action to one stated by § 905(b) of the Longshoremen's Act; in not apply-

ing general maritime law under § 905(b); and in misapplying land-based law, including several sections of the Restatement (Second) of Torts (1965).

§ 905(b) Exclusive Remedy

[1] The history of § 905(b) is important to the resolution of this case. The Longshoremen's Act provides compensation benefits to injured maritime workers. The Act forecloses negligence suits against the worker's immediate employer, but allows litigation against third parties. In the past, the Supreme Court adopted a liberal view of the third-party suit and held shipowners liable under a warranty of seaworthiness to injured employees of independent contractors working on board the ship. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). The seaworthiness remedy went beyond negligence in

two important respects. G. Gilmore & C. Black, The Law of Admiralty 542 (2d ed. 1975). First, the shipowner was liable for "transitory" defects which arose after his opportunity to correct them had passed. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960). Second, the shipowner was responsible for unsafe conditions caused entirely by the act of a third party, including the independent contractor. Alaska Steamship Co. v. Patterson, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed.2d 798 (1954). In 1972, however, Congress amended the Longshoremen's Act. Congress substantially raised the compensation benefits payable, eliminated the employee's unseaworthiness action and restricted his recovery from the shipowner to negligence. In the event of a negligence recovery against the vessel, the worker's employer

would not be liable to the shipowner for such damages. On the other hand, if the injury was caused by the negligence of the worker's employer engaged in repair service, no action is permitted against the vessel. The remedy provided by the statute against the vessel "shall be exclusive." The language of § 905(b) now provides:

(quotation omitted)

The language of the statute defeats the plaintiff's claim that § 905(b) is not his exclusive avenue of remedy. Furthermore, the elimination of the warranty of seaworthiness evinces congressional intent to curtail shipowner liability for conditions arising when the vessel is not within the owner's control and for injuries caused solely by independent contractors. Remaining is the maritime worker's right to sue for negligence only.

General Maritime Law Under § 905(b)

[2] The legislative history, as recently discussed by this Court in Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977), discloses an intent that the negligence action be a matter of uniform federal law, and, with certain exceptions, be designed to give the maritime worker the same rights against third parties as his land-based counterparts would have. One articulation of those rights, Gay noted, is the Restatement (Second) of Torts (1965). Accordingly, the plaintiff's second allegation of error must also be rejected. General maritime law no longer governs third party actions by maritime workers except to the extent that the maritime concepts have an analogy in land-based law. For instance, the Committee expressly intended that the admiralty concept of comparative negli-

gence, rather than the common law rule as to contributory negligence would apply, and that the admiralty rule precluding "assumption of risks" as a defense would be applicable. But these concepts are not exclusively maritime, and do not alter the fact that general maritime law, as such, does not control outcome of these third party actions.

Negligence Under Land-Based Law Concepts

To evaluate the plaintiff's third claim, that the court misapplied land-based law to the facts of this case, it is necessary to examine each of the plaintiff's theories of liability.

I. Duty to Provide a Safe Place to Work

The plaintiff invokes the doctrine that a shipowner has a duty to provide invitees with a safe place to work. To the extent that doctrine encompasses

liability without fault, a maritime concept, it no longer applies under § 905(b). Gay, 546 F.2d at 1239; Bess v. Agromar Line, 518 F.2d 738 (4th Cir. 1975). The doctrine does, however, have a land-based counterpart based on negligence. See Prosser on Torts § 80 (4th ed. 1971); Annot., 31 A.L.R.2d 1375.

[3] In this case, however, the doctrine does not provide a basis for recovery by the plaintiff. Under traditional interpretation the duty to provide a safe place to work does not extend to protect employees of an independent contractor from dangers the contractor was hired to correct. Whitlow v. Seaboard Air Line R. R., 222 F.2d 57 (5th Cir. 1955). The plaintiff's reliance on Halecki v. United New York & N. J. Sandy Hook Pilots Ass'n, 302 F.2d 840 (2d Cir.), cert. denied, 371 U. S. 825, 83 S.Ct. 46, 9 L.Ed.2d 64

(1962), is misplaced. In that case the shipowner directed the contractor's method of repair. Halecki v. United New York & N. J. Sandy Hook Pilots Ass'n, 282 F.2d 137, 142 (2d Cir. 1960), cert. denied, 364 U.S. 941, 81 S.Ct. 461, 5 L.Ed.2d 372 (1961). In contrast, the defendants here made no attempt to control the details of the work done by Port Allen Marine.

II. Duty on Employers of Independent Contractors

[4] Plaintiff alleges the district court misapplied several sections of the Restatement which impose liability on those who employ negligent independent contractors. See Restatement (Second) of Torts §§ 411, 413, 416, 423, 427 (1965). Freely admitting that Congress foreclosed any maritime liability of a shipowner to the employee of an independent contractor

for negligence of that contractor, the plaintiff invokes land-based law which holds an employer responsible for negligence of his independent contractors when the work involves danger. He cites § 411, which imposes a duty to select a contractor carefully, and § 413, which says an employer should take steps to ensure that an independent contractor will take special precautions when performing work creating a peculiar, unreasonable risk of harm. Plaintiff also cites several sections which impose vicarious liability on the employer. Included are § 416, which imposes liability if the contractor ignores the employer's instructions and fails to take precautions; § 423, which makes the employer equally liable with the contractor when the work involves maintaining an instrumentality used in highly dangerous activities; and § 427,

which imposes joint liability if the contractor fails to take precautions with respect to work involving inherent danger. These sections of the Restatement, however, cannot support the plaintiff's action because he is an employee of the independent contractor, and the sections only impose liability with respect to third parties.

The language of the cited sections is silent on this issue. While § 411 envisions liability to "third persons," §§ 413, 416 and 427 speak in terms of responsibility to "others," a term which arguably could indlude the employees of the independent contractor. Cf. Halecki v. United New York & N. J. Sandy Hook Pilots Ass'n, 282 F.2d 137, 139 (2d Cir. 1960), cert. denied, 364 U.S. 941, 81 S.Ct. 461, 5 L.Ed.2d 372 (1961) (employee of independent contractor covered under original Restatement of Torts § 344).

But cf. Restatement (Second) of Torts § 344, comment c (duty is "for the protection of the public who enter").

In a series of opinions, the Tenth Circuit has interpreted this ambiguity to exclude employees of independent contractors from protection. Parsons v. Amerada Hess Corp., 422 F.2d 610 (10th Cir. 1970); Eutsler v. United States, 376 F.2d 634 (10th Cir. 1967); see United States v. Page, 350 F.2d 28 (10th Cir. 1965), cert. denied, 382 U.S. 979, 86 S.Ct. 552, 15 L.Ed.2d 470 (1966). The purpose for imposing a duty of care on the employer of an independent contractor is to ensure that his enterprise will bear the costs it creates, and will not escape liability for mishandling of inherently dangerous work by delegating it to an independent contractor. Eutsler reasoned that the employer's liability

should not encompass injuries to the employees of the independent contractor because, under workmen's compensation laws, the contractor is already strictly liable for their cost. As argued in Tentative Draft No. 7, Restatement (Second) of Torts 17-18 (1962):

> "It is to be expected that the cost of the workmen's compensation insurance will be included by the contractor in his contract price for the work, and so will in any case ultimately be borne by the defendant who hires him."

See Eutsler, supra, 376 F.2d at 636.

The plaintiff counters this argument by citing Lindler v. District of Columbia, 164 U.S.App.D.C. 35, 502 F.2d 495 (1974), a case in which the D.C. Circuit allowed an independent contractor's employee to recover from the contractor's employer under a common law theory similar to Restatement (Second) of Torts § 413. See also Fitzgerald v. Compania Naviera La

Molinera, 394 F.Supp. 413, 417 (E.D. La. 1975) (dictum). The D.C. Circuit rejected the reasoning of the note in the Tentative Draft. The court observed the note was not included in the final version of Restatement (Second), and said the courts should not assume costs would be passed to the employer when the employer had no legal duty to pay them. 502 F.2d at 499. Because the Longshoremen's Act is the workmen's compensation statute for the District of Columbia, the court also gave weight to several cases stating a policy favoring liberal construction of the Act to favor third party suits by injured employees. See, e.g., Potomac Electric Power Co. v. Wynn, 120 U.S.App. D.C. 13, 343 F.2d 295 (1965).

Lindler, however, represents a minority view of land-based law which has been undermined by the 1972 amendments to

the Longshoremen's Act. The Lindler accident took place in 1970. The subsequent amendments to the Act expressly rejected the line of cases favoring third party suits upon which Lindler relied. Congress eliminated the shipowner's no-fault liability for unseaworthiness, and stated that land-based legal principles were to control the liability of third parties. To the extent the present Longshoremen's Act creates any special rules which affect the liability of those who hire independent contractors, it argues against employee suits. The Long-shoremen's Act employer, unlike his land-based counterpart, cannot seek a contractual indemnity from the independent contractor whose negligence caused the injury. See 33 U.S.C.A. § 905(b) (Supp. 1977). Furthermore, Congress intended for the rights of an employee to

be the same whether he was hired by an independent contractor or was employed directly by the shipowner. Smith v. M/V Captain Fred, 546 F.2d 119, 123 (5th Cir. 1977); cf. Restatement (Second) of Torts § 423 (1965) (employer's liability to be same as contractor's liability). It makes little sense to allow a suit for negligent supervision of an independent contractor when liability for negligent supervision of the employer's own employees would be foreclosed by the compensation statute. The statute itself indicates that an employee hired by the ship directly cannot sue the ship for injury "caused by the negligence of persons engaged in providing...repair services to the vessel." 33 U.S.C.A. § 905(b) (Supp.1977). The Committe reports indicate the word "persons" not only included fellow servants, but was also intended to include

the shipowner in his capacity as an employer of the workers doing the repair work. G. Gilmore & C. Black, The Law of Admiralty 450 (2d ed. 1975); see H.R. 92-1441, 92d Cong., 2d Sess. (1972), reprinted in [1972] U.S. Code Cong. & Admin. News, pp. 4698, 4705.

Lindler also represents a minority view among the federal circuits. Congress intended a uniform federal interpretation of § 905(b). For this Circuit to follow Lindler would militate against uniformity. As noted above, the Tenth Circuit has twice held the employee of an independent contractor cannot recover from the employer of the contractor. Eutsler, supra, 376 F.2d at 634, Parsons, supra, 422 F.2d at 610. In Eutsler, the court said that although the relevant language of the Tentative Draft was not included in the final Restatement (Second),

the language had nevertheless become an accepted part of the judicial gloss on the text. 376 F.2d at 636. Both cases involved situations where the court was not bound by applicable state law and so was free to determine the most desirable rule. Confronted with a similar opportunity, the Second Circuit reached the same conclusion. Lipka v. United States, 369 F.2d 288 (2d Cir. 1966), cert. denied, 387 U.S. 935, 87 S.Ct. 2061, 18 L.Ed.2d 997 (1967) The Eighth Circuit has split. In its most recent case, the Circuit affirmed a district court decision concluding that, as a matter of general law, the employee should not recover. Olson v. Red Wing Shoe Co., 456 F.2d 1299 (8th Cir. 1972), aff'g Olson v. Kilstofte & Vosejpka, Inc., 327 F.Supp. 583 (D.Minn. 1971). In an earlier case, however, the Eighth Circuit assumed without discussion

that the opposite rule would apply. Associated Engineers v. Job, 370 F.2d 633, 647 (8th Cir. 1966), cert. denied sub nom., Troy Cannon Const. Co. v. Job, 389 U.S. 823, 88 S.Ct. 59, 19 L.Ed.2d 77 (1967), followed in Hagberg v. City of Sioux Falls, 281 F.Supp. 460 (D.S.D. 1968). The Fifth Circuit, interpreting language in 27 Am.Jur. Independent Contractors § 39 which parallels that of the Restatement, has held the employee cannot recover. Corban v. Skelly Oil Co., 256 F.2d 775 (5th Cir. 1958). Applying the Restatement under the influence of a binding state decision, two other Circuit decisions have also denied recovery. Sword v. Gulf Oil Co., 251 F.2d 829 (5th Cir.), cert. denied, 358 U.S. 824, 79 S.Ct. 41, 3 L.Ed.2d 65 (1958) (Texas); Craig v. Olin Mathieson Chemical Corp., 427 F.2d 962 (7th Cir.), cert. denied,

400 U.S. 964, 91 S.Ct. 365, 27 L.Ed.2d 383 (1970) (Illinois). Two decisions applying the law of other states have reached the opposite conclusion. United States v. DeCamp, 478 F.2d 1188 (9th Cir.), cert. denied, 414 U.S. 924, 94 S.Ct. 232, 38 L.Ed.2d 158 (1973) (California); Grogan v. United States, 341 F.2d 39 (6th Cir. 1965) (Kentucky) (dictum).

III. Strict Liability

[5] The plaintiff also asserts that because gas-freeing a vessel is "ultrahazardous," the barge owner should be strictly liable for his damages under Restatement (Second) of Torts § 519 (1977). Again, however, plaintiff's status as an employee of the independent contractor defeats his claim. He cannot sue Port Allen Marine for strict liability because it has paid compensation benefits, 33 U.S.C.A. § 905(a) (Supp. 1977). He cannot sue the defendants because the Longshoremen's Act only allows him to sue

them for their "negligence," a phrase which on its face does not encompass strict liability. See Dalehite v. United States, 346 U.S. 15, 44-45, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) (Federal Tort Claims Act). The congressional committee reports accompanying the 1972 amendments emphasize an intent to eliminate unseaworthiness, a strict liability concept, and to limit the liability of the shipowner to injuries for which the shipowner was at fault. It would be inappropriate to judicially read strict liability into the text of the statute in view of obvious congressional intent. See Brown v. Ivarans Rederi A/S, 545 F.2d 854, 861 (3d Cir. 1976), cert. denied,---U.S.---, 97 S.Ct. 1652, 52 L.Ed.2d 361 (1977) (vicarious liability inappropriate under § 905(b)). Contra Streach v. Associated Container Transport, Ltd., 388 F.Supp. 935, 940 (C.D.Cal.1975); 29 A.L.R.Fed. 771 (1976).

IV. Duty to Maintain Premises Safe for Invitees

[6] The plaintiff alleges that even though the gasoline was an "open and obvious" danger, the defendants are liable as landlords who failed to take due care with respect to a dangerous condition aboard their barge. Restatement (Second) of Torts §§ 343, 343A (1965). Gay, in dictum, recognizes such a cause of action if invitees aboard the vessel, though aware of the danger, either could not appreciate it or could not avoid it. Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977), dealt with these Restatement sections in a case where the plaintiff employee of an independent contractor was cleaning the cargo hold of defendant's vessel. A dangerous condition developed and plaintiff was injured by a falling rack. The Court held that even if the ship's crew were aware of

the danger, there could be no duty owed by the ship where the hazardous condition was created by the stevedore's employees, and the ship's personnel were less capable of abating the danger than the independent contractor's employees.

Here the danger inherent in removing gasoline and fumes from a barge was well known to all concerned. At oral argument the Court was informed that the reason for placing Port Allen Marine on a remote stretch of the Mississippi River was to limit the possible damage an explosion would cause. The facts of this case present no basis for imposing a duty of care on the defendants. Port Allen Marine was found by the trial court to be a specialist possessing expertise in "gas-freeing" barges. As in Brown, the plaintiff here was "the person best able to appreciate the potential consequences of

the danger." 550 F.2d at 334. The precise reason for plaintiff's employment was to make an unsafe condition safe.

V. Limitation of Testimony

[7,8] Plaintiff's final contention is that the trial court erred in refusing to allow expert testimony concerning the design of the barge. While the plaintiff correctly asserts that exclusion of the doctrine of unseaworthiness does not prevent recovery for actual negligence in vessel design, the plaintiff misapprehends the ruling of the trial court. The court questioned the expert, who stated the barge had a customary design and was reasonably fit for its intended purpose. The trial court concluded that the expert had established the vessel was not negligently designed, and that any critical testimony he might give would go to unseaworthiness. The court then correctly held such testimony inadmissible.

AFFIRMED.

CAPTION DELETED APPENDIX B

MINUTE ENTRY:
APRIL 3, 1975
WEST, J.

This matter is before the Court on motion of the defendants, Lamar E. LaBauve, Thomas A. Wolfe, Joseph E. LaBauve, and Delta Laboratory for summary judgment. Exxon Corporation, another defendant, has moved for summary judgment but the Court has granted a continuance on the hearing of that motion until April 18, 1975.

Donald Bossard, plaintiff's decedent, was apparently discovered unconscious in a cargo tank of an Exxon Barge around 12:00 noon on January 5, 1975. He was removed therefrom and taken to a hospital and at 1:30 p.m. that day he died. After that time, at approximately 2:00 p.m., Delta Laboratory and Testing, Inc., was requested to test the barge for gas leaks and combustibility. Their testing began about 3:00 p.m. that day. Prior to the

time of their testing at 3:00 p.m. on January 5, 1975, neither Delta Laboratory, nor their employees, Lamar LaBauve, Tom Wolfe, and Joseph LaBauve, had any connection whatsoever with the vessel upon which the decedent died. These facts are not disputed by the plaintiff. It is obvious, therefore, that based upon these facts, which are supported by affidavits filed in the record, that none of these defendants had anything to do with the incident complained of by the plaintiff in this case, and that therefore, as a matter of law, they should be dismissed as defendants herein. Therefore:

IT IS ORDERED that the motions for summary judgment filed by Lamar E. LaBauve, Joseph E. LaBauve, Thomas A. Wolfe, and Delta Laboratory and Gas Testing, Inc., be, and they are hereby GRANTED, and this case is DISMISSED as to these defendants,

reserving to the plaintiff, however, all rights which she has or may have against the defendant, Exxon Corporation.

/s/ E. GORDON WEST
UNITED STATES DISTRICT JUDGE

John F. McKay, Esq.

E. Burt Harris, Esq.
Bernard J. Caillouet, Esq.
John F. Reid, Esq.

Andrew J. Bennett, Jr., Esq.

The deposition of Joseph LaBauve, a defendant in the Federal Court Action, taken at the instance of plaintiff in the Federal Court Action in the offices of Janet L. Parker & Associates, 982 Government Street, Baton Rouge, Louisiana, on the 10th day of March, 1975, commencing at 10:08 A.M.

way you all are called out is by an individual phone call basis?

A. That's true.

Q. You do work evidently for Port Allen Marine. Do you do any work for Gilmar Marine?

A. True.

Q. Are there any other companies in this area that you do business for?

A. What do you mean by this area?

Q. Say in the Baton Rouge proper.

A. Yaun's.

Q. Yaun's?

A. We have done work for Yaun's before. Yaun's Manufacturing.

Q. Do any of the procedures that you follow at any of these other plants where you test barges, does it differ from the procedure used at Port Allen Marine?

A. No.

Q. You have never tested for toxicity and combustibility prior to a cleaning plant sending its employees down to clean?

A. I don't think I have ever been called on a barge prior to cleaning.

Q. Are you familiar with the type of procedure used in cleaning the barges?

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A. No, I'm not.

Q. You are not?

A. No.

Q. Did you go aboard this particular Exxon barge on January 5?

A. Yes.

Q. You went aboard with your son?

A. Yes.

Q. You hadn't been there any time earlier in the day?

A. No.

Q. To your knowledge had anyone been there from Delta Lab?

A. No one that I know of. Not to my knowledge.

Q. You only have three people that do the testing?

A. True.

Q. Do you know of your own personal knowledge whether a toxicity test was done by anyone?

A. I do not.

Q. You know it wasn't done by you?

A. Correct.

Q. Could you explain to me this--I notice in your affidavit you stated that when you made a gas test Exxon did not allow you to make tests on its own barges?

CAPTION DELETED APPENDIX D

MOTION FOR SUMMARY JUDGMENT ON BEHALF OF EXXON CORPORATION

NOW INTO COURT, through undersigned counsel, comes Exxon Corporation and moves for Summary Judgment pursuant to the Rule 56 of the Federal Rules of Civil Procedure, dismissing it from this action.

Plaintiffs allege in paragraph 5 of their complaint that their claim arises out of and from the unseaworthiness of a vessel and is a Maritime Tort.

The deposition of Mr. Thomas Wolfe, Plant Manager of Port Allen Marine Services, Inc., as well as the affidavit of Mr. C. G. Bough, Repair Inspector of the Baton Rouge Branch of the Marine Department of Exxon Corporation, show that the deceased was performing work not traditionally performed by seamen, on a barge out of navigation and under the control of Port Allen Marine Services, Inc. and was owed no warranty of seaworthiness.

Furthermore, Donald Bossard met his demise due to a condition which he had gone on the barge to correct, and no warranty of seaworthiness is owed in such an instance.

WHEREFORE, defendant Exxon Corporation prays that Summary Judgment be rendered herein in its favor and against plaintiffs dismissing their suit with prejudice and at plaintiffs' cost.

BERNARD J. CAILLOUET
E. BURT HARRIS
JOHN F. REID

BY: /s/ E. BURT HARRIS
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CAPTION DELETED APPENDIX E

MINUTE ENTRY:
APRIL 17, 1975
WEST, J.

This matter is before the Court on the motion of the defendant, Exxon Corporation, for summary judgment. No oral argument is required. This is a suit brought by the survivors of an employee of Port Allen Marine Services, Inc., who died as a result of work being performed by him on a barge owned by Exxon Corporation. The complaint seeks recovery based on both an alleged unseaworthy condition of the barge and also on alleged negligence of Exxon Corporation. The plaintiffs, taking cognizance of the 1972 amendment to the Longshoremen and Harbor Workers' Act, 33 U.S.C. § 905(b), concede that the plaintiffs have no case against Exxon Corporation based upon unseaworthiness. With this, the Court agrees. However, the plaintiffs' claim is also

based on allegations of negligence on the part of Exxon. Such a claim is preserved by the 1972 amendment to the Longshoremen and Harbor Workers' Compensation Act. In connection with that claim, there are material issues of fact involved, and thus that claim would not be subject to consideration pursuant to a motion for summary judgment.

Therefore:

IT IS ORDERED that the motion of Exxon Corporation for summary judgment in its favor in connection with the plaintiffs' claim based upon alleged unseaworthiness of the barge involved be, and it is hereby GRANTED, and

IT IS FURTHER ORDERED that the motion of Exxon Corporation for summary judgment on the remaining claims made by the plaintiffs, particularly those based upon alleged acts of negligence of Exxon

Corporation be, and it is hereby DENIED.

/s/ E. GORDON WEST
UNITED STATES DISTRICT JUDGE

John F. McKay, Esq.

E. Burt Harris, Esq.
Bernard J. Caillouet, Esq.

Andrew J. Bennett, Jr., Esq.

ACTION UNDER THE SPECIAL RULE FOR LONGSHOREMEN AND HARBOR WORKERS AND/OR SEAMEN TO SUE WITHOUT SECURITY OR PREPAYMENT OF FEES FOR ENFORCEMENT OF THE LAWS OF THE UNITED STATES, COMMON AND STATUTORY, FOR THE PROTECTION OF THE HEALTH AND SAFETY OF SEAMEN AT SEA:

5.

Jurisdiction is based on the fact that this is a claim arising out of and from the unseaworthiness of a vessel, and a maritime tort occurring upon the navigable territorial waters of the Mississippi River at the Port of Baton Rouge.